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No. 99-579

IN THE

Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

Petitioners,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AND WILLIAM A. FICKLING, JR., *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether private parties or the Secretary of Labor may obtain equitable relief against nonfiduciaries who allegedly benefit from a fiduciary's violation of Title I of ERISA.

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BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AND WILLIAM A. FICKLING, JR., *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amici curiae[1] the American Council of Life Insurance ("ACLI") and William A. Fickling, Jr., Neva L. Fickling, William A. Fickling, Claudia F. Fickling, Jane Dru Fickling, Katherine M. Wright, Katherine Darden Wright, Virginia M. Rabun, W&J Capital Company, Ltd., J&R Capital Company,

[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Ltd., and Nationsbank of Georgia, N.A., as successor trustee under certain Fickling private trusts (the "Fickling *amici*") respectfully submit this brief in support of petitioners' request for certiorari.

INTEREST OF AMICI CURIAE

1. *Amicus* ACLI, based in Washington D.C., is the largest trade association representing the life insurance industry in the United States, representing 493 legal reserve life insurance companies throughout the United States. Its members account for over 77% of the life insurance, 82% of the disability insurance, and 84% of the pension business among life insurance companies in the country.

The ACLI's members are service providers performing many nonfiduciary functions for employee benefit plans, including custodial and recordkeeping services, and therefore are included in the statutory definition of "party in interest" found in ERISA § 3(14), 29 U.S.C. § 1002(14). As service providers, the ACLI's members would be subject to equitable restitution claims regardless of fault if suits against nonfiduciary parties in interest were permitted under ERISA Section 502(a), 29 U.S.C. § 1132(a). Accordingly, the ACLI and its members have a vital interest in assuring that ERISA is interpreted consistently with its text and legislative history, and that the Court clarify the scope of civil enforcement authority granted in ERISA.

2. The Fickling *amici* are defendants in a suit in which the Secretary of Labor ("Secretary") seeks equitable relief from them on the theory that they are parties in interest who allegedly participated in "a prohibited transaction" under ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A). The Secretary alleges that *amici* violated ERISA § 406(a)(1)(A), 29 U.S.C. § 1106, when they sold Charter Medical Corporation stock to Charter's Employee Stock Ownership Plan in February, 1990.

The district court initially granted summary judgment in favor of the Fickling *amici* on the ground that ERISA does not authorize the Secretary to sue non-fiduciary "parties in interest" for their participation, knowing or otherwise, in a prohibited transaction. The Eleventh Circuit reversed, concluding that the Ficklings may be held liable under ERISA if they are found to be "parties in interest." *See Herman v. South Carolina National Bank*, 140 F.3d 1413, 1419-22 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999).[2] The Seventh Circuit, in the decision below, expressly disagreed with the Eleventh Circuit's decision in *Herman*. Because the Secretary's action remains pending against the Fickling *amici* in federal district court, *amici* have a vital interest in the outcome of this case.

STATEMENT

1. In the late 1980's respondents Salomon Brothers Inc and Salomon Brothers Realty Corp. (collectively "Salomon") provided broker-dealer services to petitioner Ameritech Pension Trust ("APT" or "Trust"), which holds assets for Ameritech Corporation's employee pension plans. National Investment Services of America, Inc. ("NISA") was the investment manager to APT and, as such, was responsible for investment decisions concerning certain of APT's assets. Pet. App. 2a.

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[2] The Eleventh Circuit decision considered Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), which governs actions brought by the Secretary, while the present case was brought by private litigants under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). The pertinent language of Section 502(a)(5) is identical to that of Section 502(a)(3), relating to actions brought by private parties, and this Court has recognized that the two provisions must be interpreted consistently. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993); *see also, e.g., Reich v. Comptom*, 57 F.3d 270, 284 (3d Cir. 1995).

From 1987 to 1989 Salomon arranged financing for two motel chains, Motels of America, Inc. and Best Inns, Inc. In four separate transactions, those companies sold mortgage notes secured by certain motel properties to Salomon, who in turn sold the notes to institutional investors. As consideration for its services, Salomon received fees based on a percentage of any "net cash flow" generated by the motels involved, plus a percentage of appreciation in the motel properties upon maturity of the associated notes or sale of the properties. Pet. App. 2a.

Salomon subsequently offered to sell its participation interest in the motel properties to APT and, after extensive negotiations among Salomon, NISA, and Ameritech, APT purchased Salomon's participation interests in the four groups of motels for approximately $20 million. In the early 1990's, however, the nationwide market for hotel and motel real property collapsed and the issuers of the participation interests purchased by APT went into bankruptcy. APT suffered a considerable loss on its investment. Pet. App. 2a.

2. APT's newly appointed trustee, petitioner Harris Trust and Savings Bank, sued Salomon in 1992, alleging claims under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, and Illinois statutory and common law. To the extent pertinent here, the ERISA claim alleged that Salomon, a "party in interest" with respect to APT, participated in a "prohibited transaction" under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), when it sold its participation interest in the motel groups to APT.

Salomon moved for summary judgment on the ERISA claim, asserting that Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes a private cause of action only against *fiduciaries* who have participated in Section 406(a) prohibited transactions. The district court denied summary judgment, finding that nonfiduciary parties in interest may be

liable under ERISA for participating in prohibited transactions. Salomon moved for reconsideration, or in the alternative, certification for interlocutory appeal. Pet. App. 3a. The district court declined to reconsider its decision but later certified for interlocutory review, under 28 U.S.C. § 1292(b), the question whether ERISA authorizes an action "against a nonfiduciary party-in-interest who participated in a transaction with a pension plan prohibited in 29 U.S.C. § 1106(a)." Pet. App. 63a.

3. The court of appeals accepted the appeal and reversed. Pet App. 1a-13a. After reviewing the statutory language, legislative history, and this Court's cases, the Seventh Circuit concluded that ERISA § 502(a), 29 U.S.C. § 1132(a), does not provide for a cause of action by private litigants or the Secretary against nonfiduciary parties in interest. The Seventh Circuit explicitly recognized that its decision "creates a circuit split." *Id.* at 13a.

The court of appeals first noted that ERISA § 406, 29 U.S.C. § 1106—which precludes fiduciaries from permitting a plan to engage in certain transactions with "parties in interest"—governs only the conduct of fiduciaries. That focus, the court believed, indicates that only a fiduciary can violate Section 406. Pet. App. 7a. The court observed that Section 406 is contained within the section of ERISA addressing "Fiduciary Responsibilities." *Ibid.* The court also noted that Section 409 of ERISA, 29 U.S.C. § 1109, makes the fiduciary—and only the fiduciary—liable for breaches of the duties described in the "Fiduciary Responsibilities" part of ERISA, including those described in Section 406. *Ibid.* Because Section 502(a), 29 U.S.C. § 1132(a)(2), provides a private cause of action only to enjoin or redress "violation[s]" of ERISA, the court concluded that Section 502(a) may not be invoked against parties who are not liable under Section 409. *Ibid.*

The court of appeals further concluded that this Court's holding in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)—

i.e., that nonfiduciaries cannot be held liable even for *knowingly* participating in a fiduciary breach under Section 404 of ERISA, 29 U.S.C. § 1104—supported the court's conclusion that nonfiduciaries cannot be liable for participating in a prohibited transaction under Section 404. Pet. App. 8a. In *Mertens*, this Court reasoned that because ERISA did not explicitly provide a cause of action against nonfiduciaries for participating in a fiduciary breach under Section 404, no such cause of action exists. 508 U.S. at 254. The Seventh Circuit concluded the same logic applies to Section 406 since Section 406 simply describes another variety of fiduciary breach. Pet. App. 7a. While the court of appeals recognized that *Mertens* had indicated in dictum that parties in interest might be treated differently, so as to be subject to equitable relief in certain circumstances, the court concluded that subsequent pronouncements from this Court cast doubt on that *Mertens* dictum. *Id.* at 11a.

Finally, the court of appeals emphasized that, in enacting ERISA, Congress developed a detailed enforcement procedure under which civil penalties are the sole enforcement mechanism for nonfiduciary parties in interest who participate in prohibited transactions with pension plans. Pet. App. 9a. Indeed, the court noted that the legislative history of ERISA demonstrates that Congress deliberately chose *not* to give enforcement authority against nonfiduciaries to private parties or the Secretary, since Congress specifically considered imposing civil liability on parties in interest for participating in impermissible transactions, then elected not to do so. *Id.* at 11a-12a.

REASONS FOR GRANTING THE PETITION

This Court's intervention is essential to give an authoritative answer to the issue of whether an action may proceed against nonfiduciary parties in interest who allegedly participated in a prohibited transaction. Although the Seventh Circuit's decision is correct and should be affirmed, the Seventh Circuit also correctly recognized that five other circuits have

reached a contrary conclusion. Other courts of appeals have read this court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), as excepting statutory "parties in interest" from the general principle that nonfiduciaries are not liable under Sections 502(a)(3) & (a)(5) of ERISA. *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998); *Reich v. Stangl*, 73 F.3d. 1027 (10th Cir. 1996); *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25 (1st Cir 1994). Indeed, another court of appeals has concluded that nonfiduciaries *are* liable under ERISA if they knowingly participate in a fiduciary's breach, *whether or not* they are "parties in interest." *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998). The increasing disarray in the lower courts' approach to the liability of nonfiduciaries under Section 502(a) of ERISA clearly warrants this Court's plenary review.

I. Review Is Warranted To Resolve The Clear Conflict Among the Circuits On The Issue Of Nonfiduciary Liability Under ERISA.

In the decision below, the Seventh Circuit recognized that ERISA governs only the conduct of fiduciaries. Pet. App. 7a-9a. Because Congress specifically considered imposing civil liability on parties in interest for participating in prohibited transactions with fiduciaries, but ultimately elected not to do so, the Seventh Circuit concluded ERISA does not provide for party-in-interest liability in such circumstances. Pet. App. 11a-12a.

By contrast, the Ninth Circuit in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), construed the language of ERISA as permitting suits against nonfiduciary parties in interest. Like the Seventh Circuit, the *Nieto* court recognized that Section 406(a) of ERISA does not expressly bar parties in interest from engaging in prohibited transactions. The *Nieto* court nonetheless concluded that a suit seeking equitable relief may be brought against a party in interest who participates in a prohibited transaction, because that court believed such

suits are necessary to protect ERISA plans from the misdeeds of fiduciaries. 845 F.2d at 873-74. The *Nieto* court considered Congress' carefully developed civil penalties scheme but the court reached a conclusion directly contrary to the Seventh Circuit's holding: rather than understanding Congress' carefully considered enforcement procedure as placing the sole enforcement mechanism against nonfiduciary parties in interest with the Secretary of Treasury, the Ninth Circuit concluded that this structure contemplated suits by the Secretary of Labor (and by private parties) against nonfiduciaries because the Secretary of Labor is granted an opportunity to "correct[] the prohibited transaction" before imposing civil penalties. *Id.* at 874, n.6.

Several other courts of appeals have followed the Ninth Circuit's reasoning, but they have provided little additional insight or justification for imposing liability on nonfiduciary parties in interest. *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998); *Reich v. Stangl*, 73 F.3d. 1027 (10th Cir. 1996); *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25 (1st Cir 1994). Those circuits have been unwilling to depart from the view articulated by the Ninth Circuit in *Nieto* because they believe that this Court in effect endorsed that theory in *Mertens*.

Although this Court has expressly recognized that the brief passage from *Mertens* on which those courts have relied was dictum, and even though the bulk of this Court's discussion in *Mertens* is *inconsistent* with the rule adopted by these circuits, only this Court can authoritatively settle a division of authority that has been spawned, in large part, by one of this Court's decisions. This Court's intervention is urgently needed to reaffirm *Mertens*' basic teaching that the Secretary and private parties may not bring suit against nonfiduciaries. The Court will not benefit from deferring review of this issue to allow for further consideration by the lower courts, which have already fully examined the statutory language, the pertinent legislative history, and the previous decisions of this Court. Indeed, further review by the lower courts is unlikely to provide greater insight into the issue that currently divides the courts of appeals, and instead will simply subject nonfiduciaries to litigation under a theory of liability Congress clearly did not intend to create.

II. The Seventh Circuit Correctly Concluded That Nonfiduciary Parties in Interest May Not Be Sued for "Equitable Relief" Under Title I of ERISA.

According to several courts of appeals, ERISA authorizes suits for equitable relief against a nonfiduciary party in interest who has realized a financial benefit from a prohibited transaction—regardless of fault. The Seventh Circuit properly recognized, however, that there is no support in the text or history of ERISA for the conclusion that a private litigant or the Secretary of Labor has the authority to bring a claim against nonfiduciaries, and that ERISA's carefully integrated enforcement provisions do not authorize such suits.

1. As the Seventh Circuit properly concluded, Section 502(a) "only serves to provide a private cause of action for *violations* of ERISA." Pet. App. 8a (emphasis added). A party in interest's participation in a prohibited transaction is not a "violation" of any provision of Title I. Part 4 of Title I of ERISA is entitled "Fiduciary Responsibility." Consistent with that title, Section 406 of ERISA, 29 U.S.C. § 1106(a), addresses party-in-interest transactions solely as a restriction on *fiduciary* conduct, and "therefore only a fiduciary can violate § 1106." Pet. App. 7a; *see* 29 U.S.C. § 1106(a) ("a *fiduciary* * * * shall not cause") (emphasis added). Put differently, Section 406 does not purport to bar *non*fiduciary parties in interest from entering into prohibited transactions.

That view is consistent with the fundamental rationale of this Court's decision in *Mertens*, which expressed substantial doubt that nonfiduciaries can *ever* be held liable under

ERISA for knowing participation in a fiduciary breach, even though such liability was well established under the common law. 508 U.S. at 254. The *Mertens* Court noted only "*some* common-law 'nonfiduciaries' are made subject to [a duty not to assist in a fiduciary's breach], namely those who fall within ERISA's artificial definition of 'fiduciary.'" 508 U.S. at 255 n.5. As this Court subsequently explained, "[w]hile plaintiffs had a remedy against nonfiduciaries at common law, that was because 'nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach.' No comparable duty [is] set forth in ERISA." *Central Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 175 (1994) (internal citations to *Mertens* omitted). There can be no cause of action against nonfiduciaries for the simple reason that ERISA does not impose a *duty* on such entities.

Moreover, if, as *Mertens* and *Central Bank* indicate, there is no nonfiduciary liability even for *knowingly* participating in a fiduciary breach, it necessarily follows that there can be no nonfiduciary party in interest liability under Section 502(a) merely for participating, even innocently, in a prohibited transaction. A prohibited transaction under ERISA is no more than a statutorily defined fiduciary breach, and Section 406 of ERISA, like Section 404 (which was at issue in *Mertens*), places the burden of avoiding the fiduciary breach on the *fiduciary*, where that burden traditionally has fallen. Courts that have permitted suits against nonfiduciary parties in interest have simply ignored the reasoning and logic of the decision in *Mertens*, as reaffirmed in *Central Bank*.

The circuits who impose liability on parties in interest under ERISA § 502(a) rely on a fundamental logical flaw as well. While conceding that Section 502(a) provides no cause of action against *non*fiduciaries (including parties in interest) who knowingly participate in a fiduciary breach, those courts have nonetheless mistakenly concluded that Section 502(a) authorizes suits against nonfiduciary parties in interest who participate in prohibited transactions on the theory that such

transactions "violate" ERISA within the meaning of Section 502(a). *See, e.g. Compton*, 57 F.3d at 284-85, 287; *Rowe*, 20 F.3d at 30-32 & n.7; *see also Landwehr*, 72 F.3d at 734. But a nonfiduciary's participation in a prohibited transaction is no more a "violation" of ERISA Title I than is a nonfiduciary's participation in any other breach of fiduciary duty. In either case, ERISA Title I (and specifically Sections 404 and 406) prohibits the *fiduciary* from engaging in the conduct at issue, but does *not* purport to proscribe the conduct of any other party. If nonfiduciaries are not liable for participating (knowingly or otherwise) in a transaction that amounts to a violation of Section 404 by the fiduciary, it follows that they cannot be liable under Title I for participating in a transaction that amounts to a violation—by the *fiduciary* alone—of Section 406 either.

Petitioners err in contending that "the *Mertens* Court went out of its way" (Pet. 17) to validate the view that ERISA provides a cause of action against nonfiduciary parties-in-interest. *Mertens* did observe in passing that "professional service providers * * * must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406." 508 U.S. at 262. That comment, however, hardly represents the considered judgment of this Court. To the contrary, this Court has since gone "out of its way" (Pet. 17) to make clear that it did *not* resolve this issue in *Mertens*. As this Court has cautioned, those statements in *Mertens* "were in any event dicta, since Section 406(a) was not at issue." *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996). Indeed, the most that this Court was willing to say in *Lockheed* for the theory that nonfiduciaries can be liable under ERISA is that such theory is "not necessarily wrong" (*ibid.*)—not exactly a ringing endorsement. As the Seventh Circuit correctly observed, "not necessarily wrong" is quite a distance from being "right." Pet. App. 11a.

Petitioners' submission also ignores this Court's repeated admonitions that it is "unwilling[] to infer causes of action in

the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254. As the Seventh Circuit recognized, *Mertens* determined that Congress did not intend to impose a civil liability on nonfiduciaries who participate in a breach of fiduciary duty because ERISA does not contain an explicit statement of nonfiduciary participation liability. "Similarly, nothing in ERISA makes nonfiduciary parties in interest civilly liable to the plan for participating in a § 1106 transaction." Pet. App. 9a. While petitioners strive mightily to establish inferentially that Congress somehow intended to create a cause of action that it neglected to create expressly (Pet. 13-15), their efforts cannot be reconciled with this Court's well settled approach to the interpretation of ERISA.

2. The Seventh Circuit properly recognized that ERISA's detailed enforcement procedure provides for only one method of enforcement against nonfiduciary parties in interest—civil penalties imposed by the government. Title II of ERISA addresses the treatment to be accorded parties in interest who participate in prohibited transactions involving pension plans, but it places the sole responsibility for imposing any party-in-interest liability in the hands of the Internal Revenue Service. The detailed enforcement regime for parties in interest who participate in prohibited transactions with pension plans does not provide a role for the Secretary or for private parties to obtain equitable relief from parties in interest.[3]

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[3] The single exception is ERISA § 502(i), 29 U.S.C. § 1132(i), which authorizes the Secretary to assess civil penalties against parties in interest who participate in prohibited transactions with *welfare* plans, but not for such transactions with *pension* plans. The authority to assess that penalty for non-pension plan prohibited transactions only reinforces the proposition that the IRS has the exclusive role for nonfiduciary parties in interest involved with pension plans. *Botany Worsted Mills v. United States* 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode").

Section 4975 of the Internal Revenue Code, enacted as part of Title II of ERISA, imposes a two-tiered excise tax on any "disqualified person who participates in [a] prohibited transaction [with a pension plan] (other than a fiduciary acting only as such)," and defines "disqualified person" in terms almost identical to ERISA's definition of "party in interest." *Compare* 26 U.S.C. § 4975(a) and (e)(2) with 29 U.S.C. § 1002(14). Thus, Congress provided for excise tax liability for pension plan parties in interest in the Internal Revenue Code; it provided for equitable relief by injured private parties or the Secretary against fiduciaries in Title I. "If Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly." Pet. App. 9a. Congress instead intentionally created separate and mutually exclusive enforcement mechanisms in the pension plan context. Private litigants (or the Secretary of Labor) should not be permitted to blur such clear dividing lines.

As petitioners note (Pet. 14-15), the Secretary does have a minor enforcement role with respect to parties in interest who participate in a prohibited transaction with a pension plan, but that role is clearly defined and does not include obtaining equitable relief. Section 4975(h) contemplates that the Secretary of Labor will have "a reasonable opportunity to obtain correction of the prohibited transaction or to comment on the imposition of the tax" before the IRS imposes any excise tax. But this provision merely allows the Secretary an "opportunity" to seek a correction (from the fiduciary) or make a comment on the tax; it does not carry with it the

implication that the Secretary will have a cause of action against nonfiduciary parties in interest who participated in the transaction with a pension plan.

Any reliance on Section 4975(h) as a basis for imposing liability under Section 502 is nothing more than an attempt to bring through the back door what Congress deliberately excluded from Title I of ERISA. The fact that Congress did make certain parties in interest responsible to pay the Section 4975 tax is all the more reason to believe that the absence of any language creating civil liability in ERISA Title I means that no such liability exists. The expression of one thing is the exclusion of another. *See Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

3. If the text and structure of ERISA left any room for doubt concerning Congress' intent to impose liability only on fiduciaries, the legislative history of ERISA would put any such uncertainty to rest. The various cases that allow the Secretary or private parties to sue parties in interest under Section 502 either ignore altogether or give short shrift to a key indication of congressional intent correctly considered and relied upon by the Seventh Circuit: "Congress specifically considered imposing civil liability on parties in interest for participating in impermissible transactions, then elected not to do so." Pet. App. 12a. The Senate version of the bill that became ERISA contained an express provision requiring that parties in interest "make good" to the plan any losses resulting from their participation in prohibited transactions.[4]

[4] *See* S. 4, 93d Cong. § 15(h) (1973), *reprinted in* Senate Comm. on Labor and Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974 ("Leg. His.")at 1450 (1976); *see also* S. 1179, 93d Cong. § 501(d)(17) (1973), Leg. Hist. at 955-56.

The House bill, by contrast, did *not* provide for the imposition of any liability for participation in prohibited transactions.[5] The conference resolved that disagreement by adopting the present system of dividing enforcement between the IRS, on the one hand, and private parties and the Secretary of Labor on the other:

> The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor provisions) with respect to the plan under the tax laws (title II). *This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules* * * * *

H.R. Conf. Rep. No. 93-1280 (amendment) (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076 (emphasis added).

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, made the point even more clearly when he introduced the Conference Report. As he explained, the compromise gave "enforcement of the fiduciary provisions primarily [to] the Secretary of Labor," who would be authorized "to bring civil actions to redress or restrain violations on the part of fiduciaries." By the same token, the IRS was given "responsibility for dealing with those who are 'disqualified persons'—similar to parties in interest defined in the labor portion of the conference substitute—with

[5] *See* H.R. Conf. Rep. No. 93-1280 (amendment) (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075.

authority to impose excise taxes on" them. 1974 U.S.C.C.A.N. at 5177, 5188 (statement of Sen. Williams).

In sum, ERISA's legislative history makes clear that Congress did not inadvertently omit party-in-interest liability from the comprehensive enforcement scheme established in Title I of the statute. Instead, Congress deliberately declined to authorize the private litigants or the Secretary to pursue remedies against nonfiduciary parties in interest.

III. The Question Presented Is Important and Recurring.

1. As shown by the number of litigated cases on the issue (*e.g.*, Pet 9-10 & n.5), the question presented arises frequently in the lower courts. The Seventh Circuit's decision in this case, though correct, created a clear split among the circuits that cannot be resolved by the lower courts. The Seventh Circuit expressly rejected the position embraced by five other circuits, and it made clear that it will not reconsider its decision through the *en banc* process: recognizing that its decision in this case created a circuit split, the panel circulated the decision to all the judges of the court in regular active service as required by the Seventh Circuit's local rules. Only one judge voted for rehearing en banc, even though the full court of appeals had the benefit of the reasoning of five circuits, disagreeing with the panel's proposed decision, at the time the court considered the decision for rehearing en banc. If the Seventh Circuit is unwilling to grant rehearing to reconsider the decision below under these circumstances it is difficult to imagine why it would grant rehearing on this issue in the future. Unless resolved by this Court, therefore, the split among the circuits is certain to persist.

2. The question of nonfiduciary liability is an important component of ERISA's enforcement regime. Private litigants brought approximately 9,457 cases under ERISA in the period from September 1997 until September 1998. Judicial

Business of the United States Courts, 1998 Annual Report of the Director Leonidas Ralph Mecham 144 (Administrative Office of the United States, 1999). In that same period the Secretary brought 119 such cases. *Ibid.* Many of these cases involve suits against nonfiduciary parties in interest who were involved in prohibited transactions—parties Congress did not intend to be defendants in ERISA cases brought by the Secretary or private parties. This unwarranted litigation, which taxes the resources of already overburdened courts as well as the litigants wrongly subjected to it, will continue in many circuits unless this Court reviews and affirms the decision below.

3. Only this Court has the authority to clarify the meaning and scope of *Mertens*, and to disavow the dicta on which most circuits have relied to reach a result so plainly contrary to ERISA's text and structure. Lower courts have struggled to determine whether *Mertens* endorses or precludes nonfiduciary party in interest liability under Section 502(a) when in fact the *Mertens* Court expressly "reserve[d] decision" on that very issue. *See Mertens*, 508 U.S. at 254-55. In light of the lower court's confusion, only this Court can properly interpret ERISA and restore uniformity to this important area of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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